

PUBLIC PROSECUTOR

v.

MOHD. FUZI WAN TEH & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

SHAIK DAUD ISMAIL J

[CRIMINAL TRIAL NO. 58-4 OF 1986]

31 MARCH 1989

CRIMINAL PROCEDURE: *Trafficking - Cautioned statement - Objections - Caution not explained - Recording officer acquainted with the facts - Accused handcuffed.*

The first accused was charged with trafficking in Dangerous Drugs under s. 39(B) of the Dangerous Drugs Act 1952. The only evidence against the first accused was his cautioned statement. At the trial within a trial, the defence objected to the cautioned statement on 3 grounds namely:

- (a) the caution was not explained to accused.
- (b) the recording officer was before hand acquainted with the facts of the case.
- (c) that the accused was handcuffed throughout the recording of the statement.

Held:

[1] The administering of the caution should not be merely a mechanical exercise of just reading it to the accused. The recording officer should explain the caution and its consequences to the accused.

[2] It is highly undesirable for the recording officer to be aware of the background of the offence lest it might affect his objectivity.

[3] An accused should feel completely free from any form of restraint when giving a statement under caution and nothing should be put on his way to even suggest that he is under some form of restraint.

[4] As the three grounds of the objection were not followed to ensure voluntariness of the statement, the statement was held to be inadmissible as there has been grave doubts on the voluntariness.

[Both accused acquitted and discharged.]

Legislation referred to:

Criminal Procedure Code, s. 113

Dangerous Drugs Act 1952, ss. 37A, 39B, (2)

Evidence Act 1950, s. 24

For the first accused - Karpal Singh; M/s. Karpal Singh & Co.

For the second accused - P. M. Mahalingam; M/s. P. M. Mahalingam & Co.

For the public prosecutor - Su Geok Yiam

JUDGMENT**Shaik Daud Ismail J:**

Both the accused were jointly charged as follows:

That you jointly on 6 March 1985 at about 1.30 a.m. at a water pool, at Kampong Kerayong, Cheras, in the city of Kuala Lumpur, in the Federal Territory, did traffic in Dangerous Drugs to wit, one tin of Cannabis weighing a total of 1294.60 grammes (nett weight) on your own

- a* behalf and that you have thereby contravened the provisions of para. (a) of sub-section (1) of s. 39B of the Dangerous Drugs Act 1952 (Revised - 1980) and as amended by Act A553 of 1983 and punishable under s. 39B(2) of the same Act.
- b* ACP Megat Abdul Hamid b. Megat Jaafar (PW3) the then Officer in Charge of Police District (OCPD) Cheras on 6 March 1985 on information received led a party of police officers to an unnumbered house at Kampong Kerayong Cheras. They arrived at the said house at about 12.10 a.m. and rushed into the house. On entering they saw 2 persons lying on the floor at the front portion. One of them was first accused, while the other one Salleh. The said house was searched and on a dish rack in the kitchen was found two rolls of what was believed to contain cannabis. After this discovery PW3 directed two of his personnel to lay an ambush at the entrance to the lane leading to Kpg. Kerayong. A short while later the two personnel brought two other persons who had been arrested. One of them was second accused and the other one Kamarul Azhar.
- c* At this juncture PW3 went to an empty house situated about 15 feet from the unnumbered house and instructed that each of the four persons arrested be brought to him one by one for questioning. First accused was questioned first, followed by Salleh, Kamarul Azhar and finally second accused, PW3 asked second accused, "Dimana ganja yang lain itu disimpan?".
- d* To this the second accused was alleged to have straight away answered, "Saya akan tunjuk kepada tuan". After that PW3 said that second accused took him and his party to a mining pool behind the vacant house. At the pool second accused stood at the edge and pointed towards the direction of some bushy area in the pool and allegedly said "Dalam tin situ". PW3 said that he then shone his torchlight towards that direction and saw one tin among the bushes. He then asked second accused "tin itu ke?" and the reply was "ya". The tin was retrieved and inside were found substances believed to be cannabis. All four arrested persons together with the exhibits were taken to Cheras Police Station.
- e* As for the first accused prosecution tendered a cautioned statement (ID6). In view of the objection raised as to its voluntariness I conducted a trial within a trial. The prosecution called only one witness to prove voluntariness of ID6. He was Insp. Saumi b. Man (PW8) who testified that on 6 March 1985 as instructed by his superior officer he recorded a statement from first accused in his office. He said he personally escorted first accused to his office which was then on the 6th floor of the Kuala Lumpur Police Hqrs. at Jalan Hang Tuah. The accused was then handcuffed with his hands behind his back. Once in the office he said that he removed the handcuff and instead re-handcuffed the accused this time with his hands in front of him apparently so that accused would be more comfortable. PW8 said he then proceeded to chit chat or questioned the accused about his background which took about 20 minutes. After that PW8 said he read out the caution as in s. 37A of the Dangerous Drugs Act 1952. He then asked accused if he understood the caution and accused replied he did. After that PW3 asked accused alleged replied in the affirmative. PW8 then proceeded to record the statement at the end of which he read it back to the accused who appended his signature.
- f*
- g*
- h* At the close of the prosecution's case in the trial within a trial learned defence Counsel strongly urged upon me not to admit the statement for basically three reasons, namely the caution was not explained to accused, PW8 was beforehand acquainted with the facts of the case and lastly accused was handcuffed throughout the recording of the statement.
- i* On the first issue that is that the caution was not explained to the accused I tend to agree. PW8 in his evidence said that he 'read' the caution as in s. 37A of the Dangerous Drugs Act 1952 and nowhere did he say that he explained it as well. A man may be literate enough to be able to read but to understand and knows what the consequences of what was being

read to him is entirely another thing, more so when we are dealing with language of the law. It is my view that administering of the caution should not be merely a mechanical exercise of just reading it to the accused person. PW8 should have not merely read the caution but also explained it and its consequences to the accused. This he did not do. As contended by the defence PW8 was already acquainted with the facts of the case before he recorded the statement. This is gathered from the evidence of PW8 himself when he testified that before he recorded the statement Insp. Lai Joo Huat the investigating officer (PW1 in the main trail) had briefed him the background of the case. I am of the view that it is highly undesirable for an officer recording a cautioned statement to be aware of the background of the offence lest it might affect his objectivity in the exercise or such briefings might influence him. Although PW8 tried to explain what he meant by this no attempt was made by the prosecution to call Insp. Lai Joo Huat, who was available, (or made him available to the defence), to at least explain what actually transpired between him and PW8.

In spite of these two matters, it was in fact admitted by PW8 that accused was handcuffed albeit with his hands in front of him throughout the recording of the statement. I am of the view that handcuffing of an accused person, for whatever reasons, is a form of restraint and should be considered oppressive as to render the statement being given involuntary. According to PW8 the reason for the handcuff was to prevent accused from attempting to jump out the window as had happened in the past with other detainees. I agree with learned Counsel for the defence that this reason is immaterial for purpose of considering voluntariness of a cautioned statement as there were various other ways of overcoming the possible eventuality of accused jumping out the window e.g., by recording it at the ground floor or putting bars in the windows etc. PW8 himself conceded that the handcuffing of the accused was a form of restraint and even oppressive. An accused person should feel completely free from any form of restraint when giving a statement under caution and nothing should be put in his way or done to even suggest that he is under some form of restraint. I am of the view that on this score alone would render the statement to be involuntary.

It is my considered view that recording of a cautional statement either under s. 37A of Dangerous Drugs Act 1952 or s. 113 Criminal Procedure Code is akin to a Magistrate recording a confession under s. 24 of the Evidence Act 1950. The said Magistrate would be an independent entity who would take an independent and an objective view of the exercise and he would make absolutely sure that no inducement, threat, promise is made by anyone and he would also find out the motive for the confession and usually also physically examine the accused person. The only information which will be provided to the Magistrate would be the name of the person wanting to confess and no other information not even the background of the arrest would be made known.

In the present case, however, all these were not followed to ensure voluntariness of the statement. For the reasons given above, especially on the handcuffing of the accused, I entertained grave doubts on the voluntariness of the statement and in that event I held that the statement ID6 was inadmissible.

Since apparently the prosecution was relying solely on the cautioned statement and in view of my ruling as above, there was not one iota of evidence to connect first accused with the tin cannabis found in the pool. Prosecution had therefore not adduced a *prima facie* case which if un rebutted would warrant his conviction and I acquitted and discharged the first accused.

As for the second accused it cannot be denied that he was not found in the said unnumbered house when the police first raided it. He and one Kamarul Azhar were arrested along a path some distance away from the house. Prosecution is, therefore, relying solely on the alleged

- a* information he gave to PW3 which led to discovery of the cannabis in question. It was contended by the prosecution that since it was found it follows that second accused had access to the pond. While I cannot disagree that second accused had access to the pond, it cannot be said that he was the only one who had access. This pond is in a public place and is therefore accessible to anyone and everyone living in that area. In the circumstances of this case although second accused led PW3 to the pond in consequence of which the tin of cannabis was found, in order to ascertain his connection with the tin in question I had to scrutinise carefully the conversation between PW3 and to him. The mere fact that he led PW3 to the pond is of no value unless and until it became known what had caused the second accused to lead PW3 there. In this respect the conversation becomes very pertinent and important. From the evidence of PW3 it is pertinent to note that when he asked second accused about the cannabis he did not ask him "where he kept the ganja" but rather "where the rest of the ganja is kept". It can be discerned that there is a subtle difference between the two question. If the question had been "where did you keep the rest of the ganja" and second accused's reply "I can show it to you Sir" would undoubtedly mean one thing and one thing only that is that he had kept the cannabis at the place he intended to show PW3. In the light of the question put by PW3 and his answer and the fact that he was not staying in the house in question and the fact that he was not arrested in the house in question, and the fact that the tin was found in a public place, I am of the considered view that the answer given by second accused can in no way input exclusive possession, custody or control of the tin of cannabis on him. In the circumstances of the question put to him by PW3 and his answer and thereafter leading to PW3 to the pond by themselves might indicate that second accused desired to confess his guilt by showing the police the tin of cannabis he kept at the pond, but it might also indicate somebody else's guilt and he knew about it. It is trite law that when a set of facts is capable of more than one inference, then one most favourable to the accused must be drawn.

- f* We also have the evidence of PW3 that when he shone his torchlight he could easily see the tin as it was not hidden. From this it would not be wrong to infer that in broad daylight the tin could be easily seen by anyone from the edge of the pond. As such had the raid been during daylight I am of the view that there would be no need for anyone to point towards the direction of the tin would have been recovered easily. I also have not lost sight of the evidence by the chemist PW2 that he also analysed contents of an envelope in which he found 3.72 grammes of cannabis. This in fact was the drug recovered in the kitchen of the house in which first accused and another were arrested. In fact according to the evidence of PW2 the first accused was charged for possession of this cannabis but was subsequently acquitted.

- g* From the evidence adduced I find it as a fact that second accused was arrested some distance from the house in which were similar drugs as in the tin found in the pond. The tin was recovered in a public place where it is accessible to anyone around the area and it was not even concealed as expected. From the circumstances of second accused leading PW3 to the pond where the tin of cannabis was recovered, I am of the view that prosecution has not established a *prima facie* case that he had exclusive possession, custody or control of it, but rather it merely shows that he knew the tin was there and nothing more. As such prosecution has failed to prove a *prima facie* case which unrebutted would warrant his conviction and I therefore acquitted and discharged second accused without his defence being called.

Also found at [1989] 2 CLJ 652

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